IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

CLIVE A. STAFFORD SMITH
185 Walton Street, N.W.
Atlanta, Ga. 30303.
(404) 688-1202

Attorney for Mr. Minnick

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

QUESTION PRESENTED

WHETHER, once an accused has invoked his Fifth Amendment right to counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with a lawyer?

TABLE OF CASES

FEDERAL CASES

STATE CASES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-6332

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO
BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Robert Minnick files the following reply to the State of Mississippi's brief in opposition to his petition for a Writ of Certiorari to review the judgment of the Supreme Court of Mississippi, which affirmed his conviction and sentence of death. The decision below has now been reported. See Minnick v. State, 551 So. 2d 77 (Miss. 1988).

INTRODUCTION

Respondent argues that "Petitioner would have this Court adopt the draconian approach that once invoked one could never waive his right to have counsel present when he was interrogated

no matter what the surrounding factual circumstances showed." *Brief in Opposition at 10.* Respondent asks rhetorically whether Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), really made "a defendant a prisoner of his [own] rights." *Brief in Opposition at 9.*

If Respondent genuinely thinks this is what the issue is in this case, Respondent misperceives the point of Petitioner's claim. Certainly there are circumstances when an accused, who has invoked the protections of the Fifth Amendment, can waive his rights. For example, nobody would deny that the accused may initiate further discussions, and at that point waive his rights. See, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

The prophylactic Edwards rule was adopted by this Court to "prevent the police from effectively 'overriding' a defendant's assertion of his Miranda rights by 'badgering' him into waiving those rights." Michigan v. Jackson, 475 U.S. 625, 638, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) (Rehnquist, J., dissenting). Everyone agrees that Edwards means that once the accused asserts his Fifth Amendment right to counsel, all police-initiated interrogation must cease until the right to counsel is honored.

The question which has confused the lower courts is what it means to honor the Edwards right to counsel. On the one hand, Edwards prohibits police-initiated interrogation "until counsel had been made available" to the accused who asserts his Fifth Amendment right. Relying on this language the Mississippi Su-

preme Court rejected Petitioner's claim, ruling that once Petitioner "was provided an attorney who advised him not to speak to anyone else . . . the Edwards bright-line rule as to initiation does not apply." Minnick v. State, 551 So. 2d at 83.

On the other hand, there are the cases which rely on other language in Edwards which requires that, once the right to counsel is invoked, all police-initiated "interrogation must cease until an attorney is present." Minnick v. State, 551 So. 2d at 104 (Robertson, J., dissenting)[1] (quoting Miranda v. Arizona, 384 U.S. 436, 474, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), quoted in Edwards v. Arizona, 451 U.S. at 485). Under this interpretation Petitioner's statement should have been suppressed, for the police cannot merely wait until after the accused has had a meeting with counsel, and then "badger" him again into waiving his rights.

I. THE CASES CITED BY RESPONDENT AS "CONTROLLING" CONCERN HOW THE FIFTH AMENDMENT RIGHT TO COUNSEL IS INVOKED, AND HAVE NOTHING TO DO WITH HOW THE RIGHT MAY EFFECTIVELY BE WAIVED ONCE IT HAS BEEN INVOKED.

Respondent argues that this Court has already decided that the authorities may legitimately re-initiate questioning to obtain statements from the accused even after there has been an invocation of the right to counsel. *Brief in Opposition at 11* (citing Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93

1. On rehearing, two other justices joined Justice Robertson's dissent on this point. The final disposition of the case was therefore made on a 4-3 vote, two justices abstaining.

L. Ed. 2d 920 (1987)). Respondent argues that in Barrett the Fifth Amendment "invocation was of course held to be limited . . . as it was in the case at bar." *Brief in Opposition at 11 (emphasis supplied)*.

In Barrett the accused had agreed to speak to officers but refused to provide a written statement without a lawyer. This Court held that the invocation of the right to counsel was limited, and that an oral statement could validly be obtained.

Respondent now seeks to squeeze the facts of Petitioner's case into the rule of Barrett, stating that Petitioner "told the officers to come back on Monday after he had a chance to talk to his attorney and he might talk with them." *Brief in Opposition at 15 (emphasis supplied)*. If those were indeed the facts of the case, a close question would arise as to whether the invocation was limited.

However, the Mississippi Supreme Court explicitly found that Petitioner invoked his right to counsel saying, "Come back Monday when I have a lawyer." Minnick v. State, 551 So. 2d at 82 (emphasis supplied). There is no issue of limited invocation here, since the state court found that Petitioner "invoked his Fifth Amendment right to counsel. . . ." Id. at 83. Instead, the Supreme Court of Mississippi simply held that when the accused has been given counsel, "the Edwards bright-line rule as to initiation does not apply." Id.

Respondent now seeks to reinterpret the ruling of the Supreme Court of Mississippi. Respondent apparently concedes that

the court was wrong in holding that Edwards does not apply. Instead, Respondent proposes a new rule which would provide that an invocation of the right to counsel is only an invocation of the right to speak with counsel once. Under such a rule, a request for counsel would be fulfilled by one fleeting meeting, after which it would again be open season for the police to "badger" the accused until he confessed.

To the contrary, Edwards recognized that the invocation of the right to counsel effectively means that the accused "desire[s] to deal with the police only through counsel. . . ." Edwards, 451 U.S. at 484. While Petitioner may voluntarily change his mind and reinitiate contact, the "prophylactic" rule of Edwards assures him that he will not be subjected to continual harassment, "badgering" him into agreeing to give evidence against himself.

Respondent is seeking to avoid the interesting issue presented to this Court by saying that an invocation of the right to counsel is not an invocation of the right to counsel. However, a rose by any other name would smell as sweet. The confusion in the lower courts remains, and will only be compounded if more courts are persuaded to adopt Respondent's doublespeak.

II. NO AMOUNT OF REINTERPRETATION OF THE CASES CITED IN MR. MINNICK'S INITIAL PETITION CAN MASK THE FACT THAT THE LOWER COURTS ARE IN HOPELESS DISARRAY OVER THIS ISSUE.

Respondent's gallant effort United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied sub nom. Fairman v. Espinoza, 483 U.S. 1010, 107 S. Ct. 3240, 97 L. Ed. 2d 745 (1987), is unconvincing. *Brief in Opposition at 12.* Similarly, the Georgia Supreme Court has reached diametrically the opposite conclusion to the Mississippi Supreme Court in Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (Ga.), cert. denied sub nom. Georgia v. Roper, 493 U.S. ___, 100 S. Ct. ___, 107 L. Ed. 2d 270 (1989). Respondent basically argues that if Roper stands for Petitioner's proposition, the case was wrongly decided. *Brief in Opposition at 10-11.*

For the rest of the authority cited by Petitioner, Respondent seeks to distinguish the cases on their facts. To be sure, factual distinctions can be made between any two cases.[2] The reality is that these cases do stand for the legal proposition of Roper and Espinoza -- that Edwards prohibits police-initiated interrogation after invocation of the Fifth Amendment right to

2. Respondent's effort to distinguish Bussard v. State, 747 S.W.2d 71 (Ark. 1988), is more strained than most. Respondent misrepresents the finding of the Supreme Court of Mississippi, which explicitly held that Petitioner told the officers to "[c]ome back Monday when I have a lawyers", Minnick v. State, 551 So. 2d at 82 (emphasis supplied), not to come back "after he had a chance to talk to his attorney. . . ." *Brief in Opposition at 15.*

counsel.[3] Equally, Respondent does not challenge Petitioner's assertion that various cases take the other line on Edwards -- that one consultation with counsel is sufficient.

It is hard to make a case for harmony in the lower courts on this issue. This Court should resolve the question, and provide guidance on the true meaning of Edwards.

CONCLUSION

WHEREFORE, Petitioner Robert Minnick respectfully suggests that this Court should grant certiorari to review the decision of the court below.

Respectfully submitted,

CLIVE A. STAFFORD SMITH
185 Walton Street, N.W.
Atlanta, Ga. 30303.
(404) 688-1202

Attorney for Mr. Minnick

3. One distinction drawn by Respondent clearly has merit. Respondent is correct to note that in State v. Preston, 555 A.2d 360 (Vt. 1988), the Vermont court held that while the trial court had "appointed a public defender" the accused had apparently not yet actually consulted with the attorney. Id. at 361. The accused would prevail under these facts under either interpretation of Edwards. However, the Vermont court went on to specifically adopt the rule of United States ex rel. Espinoza v. Fairman, where the accused had had a meeting with counsel. Id. at 362.

Certificate of Service

I hereby certify that I have this day mailed a copy of the aforegoing document to the following person:

Marvin L. White, Jr.
Assistant Attorney General,
P.O. Box 220,
Jackson, Ms. 39205.

This, the 12th day of March, 1990.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT S. MINNICK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

No. 89-6332

AFFIDAVIT OF COUNSEL

STATE OF GEORGIA

COUNTY OF FULTON

COMES NOW, CLIVE A. STAFFORD SMITH, being duly sworn, and hereby deposes and states as follows:

1. I make this affidavit pursuant to *U. S. S. Ct. Rule 28.2.*

2. I am admitted to the bar of the Supreme Court of the United States.

3. I personally verified that a Reply to Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Mississippi was mailed this day to the Clerk of this Court by first class mail. The document is therefore filed.

Done, this the 12th day of March, 1990.

CLIVE A. STAFFORD SMITH

Sworn and subscribed to before
me this 12th day of March, 1990

NOTARY PUBLIC

Notary Public, Fulton County, Georgia
My Commission Expires June 9, 1991